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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 753

JOHN Q. WOOD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–36a) is reported at 295 F. 2d 772.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1961, and rehearing was denied on November 30, 1961. The petition for certiorari was filed on February 27, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the order of the district court denying the government's application for a temporary restraining order was appealable.

2. Whether the Civil Rights Act of 1957 authorizes a suit by the United States to enjoin a state criminal trial brought without factual basis and for the sole purpose of intimidating potential Negro voters.

STATUTES INVOLVED

Section 1971 of Title 42 U.S.C. provides in pertinent part:

* * * * *

(b) *Intimidation, threats, or coercion.*—No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

(c) *Preventive relief; injunction; costs.*—Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent

or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

(d) *Jurisdiction; exhaustion of other remedies.*—The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

* * * * *

Section 2283 of Title 28 U.S.C. provides:

Stay of State court proceedings.—A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Section 1291 of Title 28 U.S.C. provides:

Final decisions of district courts.—The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT

On September 20, 1961, the United States filed a complaint under the Civil Rights Act of 1957 (42 U.S.C. 1971) in the District Court for the Southern District of Mississippi, seeking to enjoin petitioners

from intimidating others for the purpose of interfering with the rights of Negroes to register and vote in federal elections in Walthall County, Mississippi. At the same time, application was made for a temporary restraining order and a preliminary injunction and numerous affidavits were filed in support of these pleadings.

The complaint and accompanying papers showed the following facts: There are approximately 2,490 Negro citizens of voting age in Walthall County, Mississippi, none of whom is registered to vote. On the other hand, there are over 4,500 white persons of voting age in the County, a substantial majority of whom are presently registered to vote.

In July 1961, John Hardy, a Negro resident of Nashville, Tennessee, and others, came to Mississippi as representatives of the Student Non-Violent Coordinating Committee, for the purpose of attempting to improve the status of Negroes by non-violent means. John Hardy, who is a student at a Tennessee college, went to Walthall County in early August to set up a school to encourage Negro citizens to register to vote and to instruct them about registration procedures and the qualifying examination. The school began on August 18, 1961, and continued until about September 9, 1961.[1] Some

[1] The materials used in the class were a facsimile of the registration form, a copy of the constitution of Mississippi, and a copy of a personal excuse sheet (on which the person could state why he had not previously attempted to register to vote). Hardy explained to those attending the school how to fill out the forms and asked them to explain various sec-

of the persons who attended the school subsequently went to the registrar's office to apply for registration. Five Negroes went to the registrar's office on August 30; three on September 5; one on September 6; and two on September 7.

On September 7, 1961, Hardy accompanied Mrs. Edith S. Peters and Mr. Lucius Wilson, citizens of Walthall County and applicants for registration, to the registrar's office. Petitioner John Q. Wood, registrar of voters for the county, informed the two applicants that he would not register them. The stated reason for this refusal was the pendency of a suit brought by the United States in August 1961, under the Civil Rights Acts of 1957 and 1960, to enjoin deprivation of voting rights in Walthall County.

Upon hearing this refusal of the registrar, John Hardy, who had been waiting outside the room in which the applicants and the registrar were talking, entered and introduced himself politely to petitioner Wood. Wood then entered an adjoining room, pulled a gun out of his desk drawer and, holding the gun in his hand, ordered John Hardy to leave. As Hardy complied and was peacefully leaving the room, Wood followed him and struck him on the back of the head with his gun, and, using profane language, ordered him to leave and not to come back. Mrs. Peters and Mr. Wilson, who were eyewitnesses to all these occurrences, helped Hardy out of the courthouse. His head was bleeding profusely and he was dazed and staggering. Mrs. Peters and Mr. Wilson helped him to a

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tions of the Mississippi constitution. About 25 Negroes attended each session and some evenings there were as many as 50 persons attending.

nearby cafe where he rested for a short period. Hardy then left to inform the sheriff, petitioner Edd Craft, of what had happened. Hardy met Craft on the street, who, after telling him that he had no business encouraging Negroes to register, promptly arrested him for disturbing the peace. When Hardy attempted to tell his side of the story, Craft threatened to beat him within an inch of his life and locked him up in jail.

In jail, Hardy was interrogated at length by petitioner Mounger, City Attorney of Tylertown, about his activities in Walthall County. He was further interrogated by petitioner Carr, District Attorney of the Fourteenth Judicial District of Mississippi. Meanwhile an affidavit charging violation of the law by Hardy had been drawn up, signed by Wood or Craft. After spending the night in the Magnolia, Mississippi, jail, Hardy was released on bond on September 8, 1961. His trial was scheduled for September 22, 1961, before the Justice of the Peace in Walthall County. Between September 7, 1961, and the time this case was presented to the court of appeals, no Negro attempted to apply for registration in Walthall County. None of the persons who had applied for registration was actually registered, and no Negro was registered in Walthall County either when the instant lawsuit was filed or when the case was taken to the court of appeals.

The complaint filed by the United States on September 20, 1961, under the Civil Rights Act of 1957, asked for a temporary restraining order against Wood, Craft, Mounger, and Carr to enjoin them from further intimidation of persons to prevent the registration of Negroes in federal elections, and, more par-

ticularly, to enjoin the use, *for that purpose*, of state criminal process against Hardy through a false and unwarranted charge. The complaint alleged specifically that the "continued prosecution of and participation in the criminal proceedings by the defendants is without justification and was and is being continued solely to attempt to intimidate, threaten and coerce Negro citizens of Walthall County for the purpose of interfering with the right of such Negro citizens to register and vote for candidates for public offices, including federal offices. * * *"

The allegations of the complaint, setting forth the foregoing facts, based upon the affidavits of Hardy, of the eyewitnesses Peters and Wilson, and of John Doar, an attorney of the Department of Justice, were in no way controverted by the defendants. Nevertheless, after a hearing at which petitioners were represented, the district court denied the temporary restraining order on September 21, 1961. In an opinion accompanying its order denying the request for a temporary restraining order, the court stated that "[i]t is not asserted or even contended that the legal remedy available to John Hardy in [the state criminal] case is inadequate or that he will be denied due process or a fair trial," that it could be presumed that justice would be done in his trial, and that therefore there could be no irreparable damage to the United States (Pet. App. 38a).

The government noted an appeal and applied to the district court for a stay and for a certificate "that an immediate appeal * * * may materially advance the ultimate termination of the litigation" under 28 U.S.C. 1292(b), both of which were denied.

A request was then made to Judge Rives of the Court of Appeals for the Fifth Circuit for a stay pending appeal, and, after argument thereon, petitioners agreed to postpone Hardy's trial until after decision by the court of appeals.[2] After full argument, the court of appeals, on October 27, 1961, reversed the district court and ordered the issuance of a temporary restraining order.

ARGUMENT

1. The initial issue in this case is whether the order of the district court denying the temporary restraining order was a final decision under 28 U.S.C. 1291 and was therefore appealable. This Court has repeatedly held that the determination whether a decision is final depends on the practical effect of the order. More specifically, the Court has frequently stated that an order is appealable when it is in fact a final decision. For example, in *Republic Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68, the Court said:

> There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the

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[2] Thereafter petitioners filed in the court of appeals counter-affidavits, purporting to demonstrate that the government's factual contentions were inaccurate. The court of appeals rejected (Pet. App. 3a) this effort to introduce new factual material in the appellate court. 295 F. 2d 772 at 775. *Hennefford* v. *Northern Pac. Ry. Co.*, 303 U.S. 17; *Harland* v. *Smith*, 22 F. 2d 769 (C.A. 9). See also *New Albany Waterworks* v. *Louisville Banking Co.*, 122 Fed. 776 (C.A. 7); *American Bemberg Corp.* v. *United States*, 253 F. 2d 691 (C.A. 3), certiorari denied, 358 U.S. 827; *Seward* v. *South Florida Securities, Inc.*, 96 F. 2d 964 (C.A. 5); *United States* v. *Sinor*, 238 F. 2d 271 (C.A. 5), certiorari denied, 353 U.S. 985.

> controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing. Cf. *Clark* v. *Williard*, 294 U.S. 211; *Gumbel* v. *Pitkin*, 113 U.S. 545, and compare *Forgay* v. *Conrad*, 6 How. 201, 204, with *Barnard* v. *Gibson*, 7 How. 650, 657.

Similarly, in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, the Court held appealable an order of the district court that a state statute—requiring the plaintiff to post security for the payment of the defense's reasonable expenses if the plaintiff lost—was inapplicable in a federal court (*id.* at 546):

> When [final disposition of the merits] comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. * * *
>
> * * * The Court has long given this provision of the statute this practical rather than a technical application.

Accord, *DiBella* v. *United States*, No. 21, this Term, decided March 19, 1962; *Cobbledick* v. *United States*, 309 U.S. 323, 328; *Swift & Co.* v. *Compania Colombiana Del Caribe*, 339 U.S. 684, 689; *Sears Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 441 (Mr. Justice Frankfurter concurring).

In addition, we submit that a refusal of a temporary restraining order, in circumstances where this refusal is in effect a denial of the injunction which is ultimately sought, may be appealed under 28 U.S.C. 1292. That section allows appeals from an interlocutory order denying an injunction. As the Court of Appeals

for the Third Circuit has stated, denial of a temporary restraining order is appealable when it would have a "potential of drastic and far reaching effect on the rights of the parties which is characteristic of orders which decide the propriety of granting or refusing injunctions." *Albert* v. *School District of Pittsburgh*, 181 F. 2d 690. See *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U.S. 188, 191–192.

Applying the above principles to this case, the government's basic claim was that the petitioners' very act in subjecting John Hardy to trial in the state court would have the effect of intimidating Negroes who desired to exercise their right to vote, irrespective of the outcome of the trial. If this is true—and not only does the uncontradicted complaint so state but the court of appeals, whose members are familiar with conditions in Mississippi, recognized that it is—then clearly the district judge's denial of the restraining order, which had the effect of allowing the state trial to proceed forthwith, would have forever precluded appellate review of the government's claim by mooting the government's case. In such circumstances, the denial of the restraining order was in practical effect final and was therefore appealable.

2. On the merits, petitioners make a series of contentions that the federal courts do not have power to enjoin a state criminal prosecution. They argue that the state is an indispensable party in any action to enjoin a criminal prosecution (Pet. 5–10); that the Civil Rights Act of 1957 (42 U.S.C. 1971) did not authorize an injunction against a state prosecution (Pet 23–28); that, contrary to the holding of the court

of appeals, the district court did not have a mandatory duty under the Act to exercise its jurisdiction (Pet. 21–23); and that 28 U.S.C. 2283 bars the federal courts from enjoining state prosecutions (Pet. 15–20). All these contentions are without merit.

a. Petitioners argue that state officials may be sued as individuals only when they are acting under a statute which is unconstitutional on its face; that when, as here, there is no attack on the constitutionality of a statute, the State must be joined as a party; and that the Eleventh Amendment bars a suit against the State. This Court, however, has held squarely to the contrary. In *Greene* v. *Louisville & Interurban R.R. Co.*, 244 U.S. 499, 507, the Court stated that the principle of allowing a federal court to enjoin enforcement of a state statute in a suit against state officials

> is not confined to the maintenance of suits for restraining the enforcement of statutes which, as enacted by the state legislature are in themselves unconstitutional. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 390, was a case not of an unconstitutional statute, but of confiscatory, and therefore unconstitutional, action taken by a state commission under a constitutional statute.

Accord, *e.g.*, *Sterling* v. *Constantin*, 287 U.S. 378, 393; *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20.

In any event, petitioner's contention is ultimately based on the Eleventh Amendment. The Eleventh Amendment, however, is in terms applicable only to actions brought against a State "by citizens of another State, or by aliens or subjects of any foreign State." The Eleventh Amendment does not apply to suits

brought by the federal government against a State. *United States* v. *Texas*, 143 U.S. 621.

b. As to petitioners' second contention, Congress has provided in the Act that "[n]o person * * * shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote * * *" and that the Attorney General may institute injunctive proceedings "[w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any [such] act or practice * * *" (42 U.S.C. 1971(b), (c), *supra*, pp. 2, 3). On its face, the statutory language reaches police officers and state prosecutors who bring false charges for the sole purpose of intimidating potential Negro voters so as to interfere with their right to vote.[3] Moreover, the legislative history of the Act directly supports this conclusion. Attorney General Brownell, testifying in support of the bill which became the Civil Rights Act of 1957, said that "we could reach only the same situations which are now susceptible to action under the Sections 242 and 241." (Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, *Civil Rights*, House of Representatives, 85th Cong., 1st Sess., pp. 606, 607). The courts had held, prior to the Attorney General's testimony, that 18 U.S.C. 241 and 242 authorized the prosecution of state officials who denied federal rights by contriving false criminal charges for ulterior purposes. *Culp* v. *United States*, 131 F. 2d 93 (C.A. 8); *Brown* v. *United States*, 204 F. 2d 247 (C.A. 6); see

[3] At the present procedural stage, the allegations of the complaint as to the intimidation must, of course, be taken as true.

also *Screws* v. *United States*, 325 U.S. 91, 126 (Mr. Justice Rutledge concurring).[4]

c. The general rule is that when the United States seeks injunctive relief pursuant to statutory authorization (such as is found in 42 U.S.C. 1971(c), *supra*, pp. 2, 3) it need not demonstrate the existence of such prerequisites to equitable relief as that the balance of convenience favors the applicant or that the public interest will affirmatively be served by an injunction. See, *e.g.*, *Henderson* v. *Bard*, 133 F. 2d 515 (C.A. 2); *Federal Trade Commission* v. *Rhodes Pharmacal Co.*, 191 F. 2d 744 (C.A. 7); *Shadid* v. *Fleming*, 160 F. 2d 752 (C.A. 10); Comment, *The Statutory Injunction As An Enforcement Weapon Of Federal Agencies*, 57 Yale L.J. 1023. This is especially the case where, as here, Congress has directed that the district courts "shall exercise" jurisdiction if the complaint states a claim for relief, and that they shall do so "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law" (42 U.S.C. 1971(d), *supra*, p. 3). This obviously refers, *inter alia*, to state

[4] Statements made by the opponents of the Civil Rights Act of 1957 also indicate that the statute would apply to state criminal proceedings. See 103 Cong. Rec. 11342-11343 (Senator Johnston); Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 1st Sess., p. 94 (Senator Stennis).

The legislative history of the Act also demonstrates that the district court's jurisdiction must be exercised. After Senator Case moved to substitute the term "may" for the term "shall," Senator Dirksen strongly objected to this proposed amendment. He said (103 Cong. Rec. 13451):

> [Senator Case] proposes that * * * the language * * * confer upon the district courts permissive authority to entertain jurisdiction if they felt they wished to do so.

criminal proceedings.[6] Thus, the court of appeals was correct in holding (Pet. App. 23a) that the district court could not, in its discretion, refuse to exercise its equitable jurisdiction by denying the temporary restraining order.[7]

d. Petitioners claim that under 28 U.S.C. 2283 and *Douglas* v. *City of Jeannette*, 319 U.S. 157, the federal

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In my judgment that would be an amazing situation, particularly in dealing with a constitutional right. If a district judge could undertake, in such a grave circumstance, to determine for himself—after proceedings had been instituted by the Attorney General—whether he would take jurisdiction, in my opinion that would be a most astonishing situation and first of all, would frustrate the entire proceedings, and also would confer an amazing power upon a judge at the district court level—the power to determine whether in a constitutional issue he would or would not accept jurisdiction.

I know that the Department of Justice is vigorously opposed to this proposal and I hope the amendment will be rejected.

Senator Case responded that "the normal rule of court is that other remedies must be exhausted first." *Ibid.* Nonetheless, his amendment was rejected by the Senate. 103 Cong. Rec. 13452–13453.

[6] This Court, in fact, implied that jurisdiction under Section 1971 is mandatory in *United States* v. *Raines*, 362 U.S. 17, 27, by citing *United Steelworkers of America* v. *United States*, 361 U.S. 39, 41–42. In the *Steelworkers* case the Court held that under the statute there involved district courts are required to grant an injunction when the government states a claim for relief in a strike situation, irrespective of any equitable discretion the court might exercise in another type of case.

[7] The court of appeals, however, only held that a temporary restraining order was mandatory on the basis of the government's papers. The district court is not required by the decision of the appellate court to grant the relief ultimately asked by the complaint unless the government proves its allegations.

courts may not interfere with state criminal proceedings. But this Court has held in *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 224–226, that the statutory bar against federal injunctions of state court proceedings does not apply to a suit brought by the United States.[8] See also *Alanzo* v. *United States*, 249 F. 2d 189 (C.A. 10). This exception has special application here because the United States is not a party in the state proceedings and thus has no remedy except in federal court. When no other remedy is available to the plaintiff, the underlying rationale of the reluctance to enjoin state court proceedings—that the plaintiff should litigate in the state courts—is inapposite.

Moreover, even if the federal government were not the plaintiff, the *Jeannette* decision itself recognizes that state court proceedings may be enjoined if irreparable injury is otherwise unavoidable or if the state prosecution was not in good faith. 319 U.S. at 164. Since *Jeannette* it has become clear that state prosecutions may be enjoined in suits by private parties if fundamental civil and personal rights are involved. *Evers* v. *Dwyer*, 358 U.S. 202; *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D. Ala.), affirmed, 352 U.S. 903; *Morrison* v. *Davis*, 252 F. 2d 102, 103 (C.A. 5), certiorari denied, 356 U.S. 968 ("whatever may be the rule as to other threatened prosecutions * * *," since the decision in *Browder* v. *Gayle*, 352 U.S. 903,

[8] The interest of the United States is, of course, independent of that of the victim of the petitioners and that of the Negroes who were intimidated by their actions. See *United States* v. *Raines*, 362 U.S. 17.

allowing suit to enjoin enforcement of criminal segregation statutes, "* * * we must consider [*Douglas* v. *Jeannette*] modified"); *Crown Kosher Super Market* v. *Gallagher*, 176 F. Supp. 466 (D. Mass.), reversed on other grounds, 366 U.S. 617.

Here, the issue involves the basic right of all American citizens, the right to vote. On the undisputed record at this stage of the litigation, the threatened prosecution of John Hardy is in bad faith. As for the unavoidability of irreparable injury, the court of appeals said (295 F. 2d 772 at 781, note 9):

> The Government's brief sets out at length why these acts alone will cause such injury as to warrant injunctive relief.
>
> "* * * On the basis of the record in this Court and in view of the conditions and circumstances prevailing in Mississippi, it is most unlikely that, if the appellees are allowed to proceed with Mr. Hardy's trial, further Negro registration will take place. The blunt truth is that it can really not be expected that Negroes who have lived all their lives under the white supremacy conditions which exist in that area of Mississippi will continue their efforts to register and otherwise to exercise their rights and privileges of citizenship if in addition to being threatened and beaten, they will also be prosecuted in state court with all that such a prosecution entails."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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